

¹ The Board will not address manner of recovery in this case as the Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Federal Employees' Compensation Act. *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

FACTUAL HISTORY

On April 27, 2006 appellant, then a 42-year-old health technician, turned a heavy patient and injured her neck and back in the performance of duty. On June 5, 2006 her claim was accepted for acute cervical strain, strain of lumbosacral and strain of back, thoracic region. On July 5, 2006 appellant was placed on the periodic rolls.

Appellant returned to work on December 13, 2006 in a full-time, modified capacity.²

On December 23, 2006 appellant was paid \$1,677.18 for the time period November 26 to December 23, 2006. On January 20, 2007 she was paid \$1,677.18 for the period December 24, 2006 to January 20, 2007.

In a May 4, 2007 preliminary decision, the Office determined that appellant was overpaid \$2,336.07 as she returned to work on December 13, 2006 but was paid compensation by the Office through January 20, 2007 thereby creating an overpayment for that period. It found that appellant was without fault in creating the overpayment.

On June 3, 2007 appellant requested a prerecoupment hearing on the issue of fault and possible waiver and submitted the overpayment recovery questionnaire. In the overpayment questionnaire, she listed her total monthly income as \$5,199.00. Appellant listed her total monthly expenses as \$5,154.00. She itemized her usual household monthly expenses as follows: mortgage \$1,734.00; food \$400.00; clothing \$141.00; utilities \$477.00; automobile loan \$541.00; credit cards \$400.00; dental insurance \$35.00; fuel for car \$300.00; life insurance \$86.00; prearranged funeral \$208.00; medications \$30.00; haircut \$16.00; hair styling \$60.00; newspaper \$12.00; gifts \$50.00; entertainment \$150.00; church donations \$150.00, pest control \$57.00; home warranty contract \$42.00; home alarm monitoring service \$31.00; and basic cable \$15.00. The hearing was held on September 19, 2007 and included testimony from appellant regarding her financial status.

In a November 29, 2007 decision, the Office hearing representative found that an overpayment of \$2,336.07 had occurred and that appellant was without fault in the creation of the overpayment. The hearing representative made a finding that appellant did not qualify for waiver because recovery of the overpayment would not defeat the purpose of the Act as appellant's monthly income exceeded her ordinary and necessary living expenses by \$1,003.00 per month. The hearing representative stated as follows: "[Appellant's] ordinary and necessary living expenses total \$4,196.00. This includes house and property taxes, food, clothing utilities, dental insurance, gasoline, life insurance, vehicle maintenance, car insurance, medication, home warranty, car payment and homeowner's insurance. [Appellant's] other reported expenses are not deemed to be necessary expenses."

LEGAL PRECEDENT -- ISSUE 1

The Act places limitations on the right to receive compensation. While an employee is receiving compensation, she may not receive salary, pay or remuneration of any type from the

² The employing establishment states that appellant was paid for full-time work beginning on December 13, 2006.

United States, with certain exceptions.³ It is therefore well established that an employee is not entitled to compensation for temporary total disability after returning to work.⁴ Temporary total disability is defined as the inability to return to the position held at the time of injury or earn equivalent wages or perform other gainful employment.⁵

ANALYSIS -- ISSUE 1

Appellant was placed on the periodic rolls on July 5, 2006. She returned to work on December 13, 2006 but continued to be paid by the Office through January 20, 2007. Appellant was being paid by both the Office and her employer from December 13, 2006 through January 20, 2007 creating an overpayment. She is not entitled to receive temporary total disability and actual earnings for the same period. The Office properly calculated that appellant was paid \$3,354.36 from November 26, 2006 until January 20, 2007. However as appellant returned to work on December 13, 2006, she should have only received \$1,018.29 of compensation during this time period. The Office properly subtracted the amount of compensation appellant should have received from the amount of compensation she did receive to find the net difference of \$2,336.07, the amount of the overpayment. The Board finds that an overpayment was created in the amount of \$2,336.07.

LEGAL PRECEDENT -- ISSUE 2

When an overpayment has been made to an individual because of an error of fact or law, the Office may consider waiving the overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁶ If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless adjustment of benefits or recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.⁷

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.⁸

³ 5 U.S.C. § 8116(a).

⁴ *E.g., Tammi L. Wright*, 51 ECAB 463, 465 (2000) (where the record established that the employee returned to work at the employing establishment for four hours a day from August 7, 1996 to January 8, 1997 but received compensation for total disability for that same period, the Board found that the employee received an overpayment of compensation).

⁵ 20 C.F.R. § 10.400(b) (1999).

⁶ *Id.* at § 10.433(a).

⁷ *Id.* at § 10.434.

⁸ *Id.* at § 10.438(a).

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.⁹ An individual's total income includes any funds which may reasonably be considered available for his or her use, regardless of the source. A spouse's income will not be considered available to the individual, unless the spouse was living in the household both at the time the overpayment was incurred, and at the time waiver is considered.¹⁰

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹¹

ANALYSIS -- ISSUE 2

The Office found that appellant was not at fault in the creation of the overpayment. Although appellant was not at fault in creating the overpayment she is still required to return the amount unless recovery of it would defeat the purpose of the Act or be against equity and good conscience.

In its November 19, 2007 overpayment decision, the Office hearing representative determined that recovery of the overpayment would not defeat the purpose of the Act as appellant's monthly income exceeded her expenses by \$1,003.00 per month. The hearing representative relied upon information provided by appellant in a June 3, 2007 overpayment recovery questionnaire. The hearing representative found that appellant's reasonable ordinary expenses included mortgage, property taxes, food, clothing, utilities, dental insurance, gasoline, life insurance, vehicle maintenance; car insurance, medication, home warranty, car payment, and homeowner's insurance. In doing so, the hearing representative did not make specific findings but apparently excluded appellant's other listed expenses for prearranged funeral expenses, gifts, charity, pest control, home alarm, hair cut and styling; credit cards and entertainment.

An individual's ordinary and necessary living expenses include fixed living expenses, such as food and clothing, furniture, household and personal hygiene supplies, rent, mortgage payment, utilities, maintenance, insurance (auto, life and health), tax, automobile expenses and commuting expenses. Additional allowable expenses include nonreimbursed medical and

⁹ 20 C.F.R. § 10.436. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

¹⁰ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(2) (October 2004).

¹¹ *Id.* at § 10.437.

hospitalization expenses, church and charitable contributions made on a regular basis and miscellaneous expenses, such as newspapers and haircuts, not to exceed \$50.00 month.¹²

A finding that a type of expense is ordinary and necessary does not mean that the amount is ordinary and necessary. The burden is on the claimant to show that the expenses are reasonable and needed for a legitimate purpose. If the Office determines that the amount of a particular expense is not ordinary and necessary, it must state in writing the reasons for the finding. Furthermore, the finding must be supported by rationale, which may include reference to recognized research data that would show that the claimant's expenses exceed the average or range of expenses for the general population relevant to the claimant's circumstances.¹³

The Office hearing representative erred in disallowing many of appellant's claimed expenses without providing a reason. The error however is harmless error in that it is clear that not all of appellant's allowable expenses are reasonable in amount. For example, miscellaneous expenses are to be limited to \$50.00. Appellant claimed a monthly expense for entertainment in the amount of \$150.00. At most only \$50.00 of this amount is allowable as reasonable. If \$100.00 of the entertainment expense is disallowed then appellant's income still exceeds expenses by at least \$145.00 per month.

The Board finds that as appellant's monthly income exceeds her monthly expenses by at least \$145.00 per month she is not entitled to waiver as she does not need substantially all of her income to meet current ordinary and necessary expenses.¹⁴ Appellant is therefore not entitled to waiver of the overpayment under the "defeat the purpose of the Act" standard.

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁵ In this case, appellant has neither alleged, nor submitted evidence demonstrating that she relinquished a valuable right or changed her position for the worse in reliance on the compensation payments she received. Accordingly, the Board finds that the Office did not abuse its discretion in denying waiver of the overpayment in this case.

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(3) (May 2004).

¹³ *Id.*

¹⁴ An individual is deemed to need substantially all of her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1)(b) (May 2004).

¹⁵ 20 C.F.R. § 10.437.

CONCLUSION

The Board finds that the Office properly determined the fact and amount of overpayment and properly determined that appellant was not eligible for waiver.

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 20, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board